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**C.T. Taylor Company, Inc., and Structural Building Systems, Inc., Joint Employers and Laborers International Union of North America**

**C.T. Taylor Company, Inc., and Structural Building Systems, Inc., Joint Employers and International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local No. 17. Cases 8-CA-33875 and 8-CA-33950**

September 10, 2004

**DECISION AND ORDER**

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN  
AND WALSH

On April 1, 2004, Administrative Law Judge George Carson II issued the attached decision. The Respondents and the General Counsel filed exceptions, supporting briefs, and answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order.

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Structural Building Systems, Inc., Hudson, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C., September 10, 2004

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Robert J. Battista, Chairman

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Wilma B. Liebman, Member

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Dennis P. Walsh, Member  
(SEAL) NATIONAL LABOR RELATIONS BOARD

<sup>1</sup> In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) and (3) by discriminatorily discharging employee James Ralston, we rely solely on the judge's finding of pretext, and thus we find it unnecessary to pass on the judge's alternative application of a dual motive analysis. In addition, we note that the General Counsel did not except to the judge's dismissal of the allegations regarding Matthew MacLellan. Finally, Chairman Battista notes that it is not necessary for the Board to address whether Will DeVito, Bruce Hensley, or Jeffrey Carlson were bona fide applicants.

Steven Wilson, Esq., for the General Counsel.

Carl H. Gluek, Jr., and Rebecca J. Bennett, Esqs., for the Respondents.

**DECISION**

**STATEMENT OF THE CASE**

GEORGE CARSON II, Administrative Law Judge. This case was tried in Cleveland, Ohio, on February 2 and 3, 2004, pursuant to a consolidated complaint that issued on August 28, 2003.<sup>1</sup> The complaint alleges that Respondents discharged one employee, refused to consider for hire four employees, and failed to hire three employees because of their union affiliation in violation of Section 8(a)(3) of the National Labor Relations Act. The Respondents' timely answers deny any violation of the Act. I find that the Respondent Structural Building Systems, Inc., did violate the Act by discharging one employee, but that the evidence does not establish the refusal to consider or the refusal to hire allegations.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondents, I make the following

**FINDINGS OF FACT**

**I. JURISDICTION**

The Respondent C. T. Taylor Company, Inc. (herein referred to as Taylor), an Ohio corporation, performs work in the construction industry from its offices in Hudson, Ohio, where it annually purchases and receives goods and materials valued in excess of \$50,000 directly from points outside the State of Ohio. I find and conclude that Taylor is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent Structural Building Systems, Inc. (herein referred to as S.B.S.), an Ohio corporation with an office in Hudson, Ohio, provides labor-related services in the construction industry and annually provides services valued in excess of \$50,000 directly to Respondent Taylor, an entity engaged in interstate commerce. I find and conclude that S.B.S. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Taylor and S.B.S. admitted at the hearing, and I find and conclude that Laborers International Union of North America and International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local No. 17, are labor organizations within the meaning of Section 2(5) of the Act.

**II. ALLEGED UNFAIR LABOR PRACTICES**

**A. The Joint Employer Issue**

Charles Taylor is the President of Taylor. Taylor is a contractor. Prior to 1997, Taylor had an arrangement with a company identified as Esprit Constructors to provide labor to per-

<sup>1</sup> All dates are in 2002 unless otherwise indicated. The charge in Case 8-CA-33875 was filed on December 10 and was amended on February 26, April 25, and May 12, 2003. The charge in Case 8-CA-33950 was filed on January 21, 2003, and was amended on February 18, March 17, June 6 and August 21, 2003.

form jobs obtained by Taylor. S.B.S. was incorporated on May 29, 1997, by Owner and President Paul Mills. Shortly thereafter, President Mills entered into an agreement with Taylor pursuant to which S.B.S. agreed to provide labor to Taylor at the rate of cost plus 4 percent and Taylor agreed to provide clerical and accounting services to S.B.S. Charles Taylor and Paul Mills are not related to one another and there is no evidence of any familial or financial interrelationship between these two entities other than as provided in the foregoing agreement.

The complaint alleges that Taylor and S.B.S. are joint employers, not a single employer or alter ego. Pursuant to their agreement relating to clerical and accounting services, the two companies operate out of the same building in Hudson, Ohio. They have the same address and telephone number. Taylor is known in the area as a general contractor. There is no evidence of similar name recognition with regard to S.B.S. Craft employees who seek work by coming to the office in Hudson or calling are unaware that their employer will be S.B.S.

When Mills established S.B.S., he adopted the same work rules as Taylor. Mills testified that he has, over the past several years, made changes to those rules. He acknowledged that he has occasionally discussed some of those changes with President Taylor prior to implementing the change, but that President Taylor has never requested that S.B.S. change a work rule. S.B.S. employs 17 supervisors. The supervisors have authority to discipline S.B.S. employees. Mills' testimony that he alone makes all hiring and firing decisions is uncontradicted.

The two businesses perform separate functions. Taylor is a general contractor or subcontractor, depending upon the size and nature of the job. Taylor employs project managers, estimators, salesmen, and clerical employees. It employs no craft employees or supervisors. S.B.S. employs approximately 150 employees in various construction crafts including laborers, carpenters, and ironworkers. When Taylor obtains a job, rather than hiring subcontractors, it advises S.B.S. of its needs, and S.B.S. fills the positions. Taylor will seek subcontractors if the job is too large for the S.B.S. employee complement to handle or if the job requires craft skills that the S.B.S. employees do not possess. S.B.S. employees work under the supervision of S.B.S. supervisors. Taylor employs no craft supervisors.

S.B.S. does not bid on work obtained by Taylor. President Mills explained that, because of their relationship, Taylor is aware generally of what labor costs will be and that Taylor learns the actual cost of labor when it receives a weekly invoice from S.B.S. S.B.S. occasionally provides craft labor to other entities. The last occasion reflected in the record occurred in fall of 2002 when S.B.S. provided labor to North American Pre Cast. As with Taylor, the S.B.S. employees performed that work under the supervision of S.B.S. supervisors. Although the absence of bidding for work obtained by Taylor reflects less than an arm's-length relationship between these two entities, President Mills denied that Taylor has any role in setting the wages of the craft employees hired by S.B.S. and there is no evidence to the contrary.

The General Counsel argues that comments allegedly made by Charles Taylor to Regional Organizer Matthew (Matt) MacLellan of the Laborers Union, who had applied for work with S.B.S., reflect a joint employer relationship. I do not

agree. MacLellan recalled that on May 1, 2003, in the course of a casual conversation when he saw Taylor at a restaurant, he asked "when I was going to go to work for him" and that Taylor replied that he did not understand why he "as a owner of a Company . . . would have to hire a 'salt.'" Taylor, who did not recall the conversation, testified that "we don't hire those employees [laborers], they go through S.B.S." Even if I credit MacLellan's recollection, Taylor's reference to his ownership establishes that he understood MacLellan to be inquiring about employment with C. T. Taylor Company since he does not own S.B.S. MacLellan's question was hypothetical. He had never sought employment with C. T. Taylor Company. Taylor's response did not refuse employment; it reflected his lack of understanding. MacLellan was aware that Taylor and S.B.S. considered themselves to be distinct entities. On February 26, 2003, in his capacity as Regional Organizer, he had filed an amended unfair labor practice charge naming Taylor and S.B.S. as a single employer.

In *Riverdale Nursing Home*, 317 NLRB 881 (1995), the Board reiterated the appropriate standard for determining a joint employer relationship.

In order to establish that two otherwise separate entities operate jointly for the purposes of labor relations, there must be a showing that the two employers "share or codetermine those matters governing the essential terms and conditions of employment." *TLI, Inc.*, 271 NLRB 798 (1984), citing *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117 (3d Cir. 1982). The employer in question must meaningfully affect "matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction." *TLI*, supra. Id. at 882.

In this case, the employees of S.B.S. work under the direction of S.B.S. supervisors. Although President Mills acknowledged that there may have been an occasion when a Taylor project manager interacted with a senior employee because an S.B.S. supervisor was not present, such an occasion would be unusual. Mills also acknowledged that Taylor has, on occasion, requested that a particular employee be removed from a job; however, there is no evidence that such a request is different in character from such a request being made by any general contractor of a subcontractor. Taylor does not have the authority to remove S.B.S. employees. Unlike *Pacemaker Driver Service*, 269 NLRB 971 (1984), cited by the General Counsel, S.B.S. employees are not furnished to the other "joint" employer. In *Pacemaker*, "the day-to-day control of the drivers was through Carrier," the joint employer to whom the drivers were furnished. Id. at 974. The work of S.B.S. employees is directed by S.B.S. supervisors, not Taylor project managers. Taylor has no craft supervisors. S.B.S. sets its pay rates and hires and fires its hourly craft employees with no direction from Taylor. Taylor has sought to, and succeeded in, removing itself from the stress inherent in managing a large work force of hourly employees. This record does not establish that Taylor and S.B.S. are joint employers.

## *B. The Discharge of James Ralston*

### 1. Facts

In early June 2002, union member James Ralston agreed with Laborers Union Business Manager Kenny Holland to seek work without revealing his union affiliation. On June 7, he applied for employment at the Taylor and S.B.S. office. In order to avoid any revelation of his union affiliation he falsified his application by not correctly reporting the identity of several prior employers that were union contractors. Nor did he report that he had sustained an on-the-job injury while working for Howard Concrete Pumping, a union contractor, and that he had a current workers compensation claim pending against that employer.

Pursuant to instructions he received from receptionist Shelly Mount when he submitted his application, Ralston called the office the following week to arrange for an interview. Ralston was interviewed by S.B.S. President Mills and was hired on June 10. He began work on Monday, June 17. He learned that his employer was S.B.S. rather than Taylor when he received his employee handbook. During the following week, S.B.S. Supervisor Tim Farland told Mills that Ralston was “a good worker.”

President Mills, pursuant to his standard practice, submitted the names of recent hires to an investigative agency in order to determine whether their information relating to workers compensation claims was accurate. On June 24, Mills was advised that the information submitted by Ralston was inaccurate. He had a current claim against a prior employer.

The application form submitted by prospective employees states that the employee understands “that false or misleading information given in my application . . . may result in discharge.” Additionally, the S.B.S. policy booklet provides that “immediate dismissal will apply to . . . falsification of records, including but not limited to employment applications . . .”

Notwithstanding the foregoing policies, Mills did not discharge Ralston when he discovered the falsification. He went to the jobsite and confronted Ralston, asking why he had lied on his application. Ralston answered that he did not believe that he would have been hired if he had reported the outstanding claim, that his “family was starving and I needed to find work one way or the other.” According to Ralston, Mills replied that it was unfair of him to assume, and asked whether Ralston had a release from his most recent doctor. Ralston replied that he did have a release but not from his most recent physician. Mills asked Ralston to obtain a release from his most recent doctor and “bring it into his office the following morning; that he would give me another chance.”

Mills, implicitly denying the “another chance” comment, testified that he informed Ralston, “[B]efore I can even consider allowing you to work, I would have to have a doctor’s excuse to allow you to be present and on the job, to tell me that you’re capable of doing this work.” Mills testified that he also wanted to “check background information,” that he did “not have all of his paperwork . . . at that time so I needed to go back to the office to check all that paperwork.” He did not inform Ralston of this. In view of Ralston’s admission regarding the outstanding workers compensation claim, there would have been

no reason to check anything if Ralston was to be discharged for falsification. I credit Ralston.

As Ralston was leaving the jobsite, S.B.S. Superintendent Mike Pastis and Supervisor Tim Farland followed him, asking what was going on. Ralston explained that he had not reported his workers compensation claim against his former employer, a union contractor, that he was a “salt” and was there to organize S.B.S. At the hearing, Ralston identified the contractor as Howard Concrete Pumping. Ralston assumed that Mills had become aware of the identity of the company against which the workers compensation claim was pending. Mills denied that he learned of the identity of the company.

The following morning, at 6 a.m., Ralston presented Mills with a medical release signed by his physician, Dr. Keith Unger, stating that Ralston was “sufficiently recovered to resume a normal workload.” Mills accepted the release and told Ralston that he would like for him to take a urinalysis and that “they were going to send me to the . . . Bay Village job.” Mills asked him to have a seat in the main waiting room. According to Ralston, he waited for several hours, returning to Mills’ office several times and, on each occasion, was told it would be “a little while and to have a seat.” After lunch, Ralston stated that he became “pretty irritated.” He again went to Mills’ office and stated, “There’s no sense in any more lies, let’s bury the hatchet.” He laid his “work rights sheet,” which identified him as a union organizer, on Mills’ desk. Mills made no comment but took the sheet and made a copy. He then asked Ralston to return to the waiting room. Ralston recalls that about 10 minutes later Mills called him to the office where he presented him a termination notice stating that he was being terminated for “falsification of employment application.” Ralston signed the document and received his final check. Ralston then asked Mills if he was “sure you want to do this,” noting that his supervisors had been happy with his work and that it was illegal to fire him “for being Union.” Mills replied that he would “worry about that bridge when he got to it.” Mills did not deny the foregoing conversation.

Mills testified that Ralston was only present at the office from 6 a.m. until 10 a.m. He acknowledged receiving the medical release from Ralston, but testified that he “found it strange that the Center of Natural Medicine was writing him an excuse for all of the claims” that were the subject of the workers compensation claim. Despite this, Mills did not question Ralston regarding the release, nor did he attempt to contact the Center for Natural Medicine, the telephone number of which was on the release. He acknowledged that, at some point, Ralston “handed me paperwork about him being a Union employee” and that he, Mills, “also spoke to him about possibly going up and taking a urinalysis.” The foregoing testimony, when given on direct examination, was not specific with regard to time and does not establish that both of these subjects occurred in the same conversation. On cross-examination Mills admitted that he did not “know when that [the urinalysis request] went on.” I credit Ralston’s testimony that, at 6 a.m., when he presented his medical release, Mills informed him that he wanted him to take a urinalysis and that he intended to refer him to the Bay Village job. This occurred in a separate conversation prior to when Ralston presented the document establishing his union affiliation.

Mills initially testified that he did not recall any discussion regarding a urinalysis or sending Ralston to another job. Following Ralston's testimony, he acknowledged that he had mentioned that he wanted him to take a urinalysis but again testified that he did not recall mentioning sending Ralston to another job. Mills testified that the laboratory that performed urinalyses did not open until 8 a.m. The 8 a.m. opening time explains, and is consistent with, Ralston's testimony that, after he presented the medical release and Mills spoke to him about a urinalysis and sending him to the Bay Village job, that Mills told him to have a seat.

According to Mills, during the period between 6 a.m. and 10 a.m., he spoke with Ralston two or three times. He did not recall what was said each time. He admitted that it was after Ralston revealed his union affiliation that he informed him that he was firing him for falsification.

Mills testified that he "hadn't made a decision" regarding termination when he spoke with Ralston about "possibly going up and taking a urinalysis." Counsel for the General Counsel asked Mills why he would "waste the time and money" on a urinalysis if he "had any doubts in your mind about keeping him on?" Mills answered, "Okay, number one, I wasn't the one that introduced that I was sending him for a urinalysis. Mr. Ralston introduced that," referring to Ralston's testimony. Counsel then addressed Mills: "But you admitted this morning ... that it [Ralston's testimony] was accurate." Notwithstanding his admission, Mills illogically answered, "That conversation may have went on, yes. But, we, if people are injured on the job site and everything, we have a policy we send for a urinalysis." Counsel noted that Ralston had not been injured on an S.B.S. job site. Mills responded that he was never actually sent for a urinalysis.

I do not credit Mills' testimony that he had not made a decision regarding termination when he discussed the urinalysis with Ralston. He had made a decision, a decision to retain Ralston as an employee. Mills' defensive demeanor and reference to a policy that was not applicable to Ralston, a urinalysis after an injury on an S.B.S. jobsite, belie any indecision regarding retaining Ralston. Mills intended to send Ralston to the Bay Village job as soon as he passed the urinalysis. Regardless of whether Ralston waited through lunch, as he recalled, or until 10 a.m., as Mills recalled, Mills did not carry through with his stated intention of sending Ralston for a urinalysis, and he gave no explanation for not doing so. Although Mills denied learning the identity of Ralston's previous employer, he did not deny receiving information from Superintendent Mike Pastis or Supervisor Tim Farland regarding Ralston's admission to them the previous afternoon that he was a "salt." Neither Pastis nor Farland testified.

Mills denied that Ralston's union affiliation related his decision to terminate Ralston, and he asserted that the decision "was totally related to the falsification of records" that it "goes back to honesty, integrity and if he's going to lie up front right off the bat, where we headed from there." The foregoing rationale, if it were credible, would have resulted in Ralston's immediate termination as soon as he admitted omitting the outstanding workers compensation claim from his application. I do not credit the foregoing testimony.

Mills testified that S.B.S. has hired applicants who have worked with union contractors, and the application of one such employee was placed into evidence. There is, however, no probative evidence that S.B.S. has knowingly hired an active current union member.

Mills testified that some former employees, the names of whom he could not recall, had been terminated for falsification of timecards. Documentary evidence establishes that false information on an employment application played a part in the termination of only one other employee. Employee Jeff Max was terminated on September 14, 2001, for "false information/could not operate backhoe."

## 2. Analysis and concluding findings

The complaint alleges that the Respondents discharged Ralston because of his assistance to the Laborers Union in violation of Section 8(a)(3) of the Act. The Respondents note in their brief that the initial charge filed by the Laborers Union was filed only against C. T. Taylor Company, not S.B.S., and that Ralston was not alleged as a discriminatee until the Laborers Union filed its third amended charge on May 12, 2003, but they do not argue that the charge is untimely. Amendments to identify the correct employer may be made even after a complaint issues so long as there is no prejudice. See *Specialty Envelope Co.*, 313 NLRB 94 (1993), citing *American Geriatric Enterprises*, 235 NLRB 1532, 1534-1536 (1978). There has been no prejudice to S.B.S. As hereinafter discussed, when union affiliated applicants sought employment on July 25, Charles Taylor addressed them regarding the application procedure. Having acted as the agent of S.B.S. on July 25, Charles Taylor was likewise the agent of S.B.S. when C. T. Taylor received the charge alleging that it had unlawfully refused to consider for hire or to hire Regional Organizer MacLellan on and after July 25. Thus, S.B.S. was placed on notice as of December 10 that its conduct on July 25 was being alleged as unlawful. The Section 10(b) date established by the filing of that charge was June 10. Regarding the addition of Ralston as an alleged discriminatee, it is well settled that amendments to a timely charge are deemed to relate back to the date of filing of the original charge, so long as the matters alleged are similar and arise out of the "same course of conduct" as is contained in the original charge. *Pankratz Forest Industries (Kelly-Goodwin Hardwood Co.)*, 269 NLRB 33 (1984). In the instant case, the termination of Ralston on June 25 is well within the Section 10(b) period. The alleged refusal to consider MacLellan for hire occurred exactly one month later, on July 25. The conduct alleged in both instances relates to exclusion of active prounion employees from the S.B.S. workforce. See *Well-Bred Loaf*, 303 NLRB 1016 at fn. 1 (1991).

It is undisputed that Ralston was not terminated until after the Respondent S.B.S. became aware of his union affiliation. Thus, pursuant to *Wright Line*, 251 NLRB 1083, 1089 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981). cert. denied 455 U.S. 989 (1982), I find that Ralston was engaged in union activity and that S.B.S. was aware of that activity. I further find that animus towards Ralston's union activity was a substantial or motivating reason for his termination. I am mindful that no independent Section 8(a)(1) allegations are contained in the complaint;

however, “motive may be inferred from the total circumstances proved.” *Fluor Daniel, Inc.*, 304 NLRB 970 (1991), enf’d. 976 F.2d 744 (11th Cir. 1992). Furthermore, “[t]iming alone may suggest antiunion animus as a motivating factor in an employer’s action.” *Sears, Roebuck & Co.*, 337 NLRB 443 (2002), citing *Masland Industries*, 311 NLRB 184, 197 (1993), quoting *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984).

Although the S.B.S. application provides that false information may result in termination and its policy manual provides that falsification of the application is ground for immediate termination, Mills did not terminate Ralston when he learned of the falsification. He directed that he obtain a doctor’s release. Mills’ failure to terminate Ralston immediately upon his admission of the falsification of his application suggests that Mills did not intend to take action because of that falsification against Ralston, who had been identified as “a good worker.” He was, as he told Ralston, willing to give him another chance assuming that he presented a medical release.

Mills’ intention to retain Ralston had not changed when he met with Ralston on the following morning and accepted the medical release that he presented. Mills’ testimony that he had misgivings regarding the document is belied by his failure to express any reservation regarding its sufficiency to Ralston and the absence of any effort to investigate by calling the telephone number on the release. The Respondents’ brief does not address Mill’s admitted request that Ralston take a urinalysis. I have found that Mills requested that Ralston take a urinalysis before being sent to the Bay Village jobsite. Mills’ explanation that he intended to send Ralston for a urinalysis because of the company policy requiring a urinalysis after an injury on an S.B.S. jobsite, rather than because he intended to retain Ralston as an employee, is incredible in view of the fact that Ralston had not been injured on an S.B.S. jobsite. Pursuant to Mills’ request, Ralston waited. The laboratory that performed urinalyses did not open until 8 a.m. The foregoing actions confirm that Mills had decided to retain Ralston as an employee.

Thereafter, a precipitous change in Mills’ actions occurred. He did not send Ralston for a urinalysis. A “precipitous change” in a respondent’s course of action may reinforce a determination that the “the change was discriminatorily motivated.” *Link Mfg. Co.*, 281 NLRB 294, 299 (1986). Mills did not address why he did not send Ralston for the urinalysis. His failure to offer any explanation regarding why he did not do so suggests that he received information that changed his intention to retain Ralston as an employee. If that information had been objective information, such as medical evidence that contradicted the absence of any limitations as reflected on the release that Ralston provided, I have no doubt that the Respondent S.B.S. would have proffered that information and that Mills would have cited that evidence as the basis for his action. His failure to cite any reason for not sending Ralston for the urinalysis supports an inference that he received information related to Ralston’s protected activities.

Although Mills denied becoming aware of the identity of Ralston’s previous employer, he did not deny becoming aware of Ralston’s conversation with Superintendent Pastis and Supervisor Farland in which Ralston admitted that he was a “salt.” Although denying that Ralston’s identification as a union “salt”

was the reason that he terminated him, Mills never addressed his inconsistent action of requesting that Ralston take a urinalysis but then never sending him for that urinalysis. The evidence suggests that Mills first learned of Ralston’s union affiliation from a source about which he did not testify, and that he delayed sending Ralston for a urinalysis while considering how to handle the situation. When Ralston confirmed that he was a union “salt,” Mills had no need for further consideration. He discharged him.

The General Counsel established that Ralston’s union activity was a substantial and motivating factor in the Respondent S.B.S.’s decision to terminate him. The absence of any explanation for S.B.S.’s precipitous change in its announced intention of sending Ralston for the urinalysis and to the Bay Village job is persuasive evidence that, upon learning of Ralston’s organizational objectives, it seized upon the falsification of his application as a pretext in order to justify his termination. When the reason given for the action is false, the respondent has not rebutted General Counsel’s prima facie case. *Limestone Apparel Corp.*, 255 NLRB 722 (1981).

Even if analyzed as a dual motive case, the Respondent S.B.S. has failed to establish that it would have taken the same action in the absence of Ralston’s union activity. In only one other instance has S.B.S. cited falsification of an application in connection with a termination and, in that instance, there was a second more compelling reason for the termination: the employee could not do the job. Just as in *Iplli, Inc.*, 321 NLRB 463, 466 (1996), the employee terminated for falsification was also unable to perform the job. In this case, as in *Iplli, Inc.*, “there was no issue as to the ability of . . . [the unlawfully discharged employee] to do the work.” If termination had been warranted for the falsification alone, Ralston would have been discharged when he admitted falsifying the application. S.B.S. had not demonstrated that it would have terminated Ralston in the absence of his protected union activity.

The Respondent S.B.S., by terminating James Ralston because of his union activity, violated Section 8(a)(3) of the Act.

### C. The Refusals to Consider for Hire or to Hire

#### 1. Facts

Taylor and S.B.S. share office space and have the same address and telephone number. Applicants for employment enter the office and deal with receptionist Shelly Mount. As James Ralston explained, he thought that he was seeking employment with Taylor, but he discovered that he was actually employed by S.B.S. President Mills testified that applicants must fill out an employment application and, before being hired, interviewed by him. Ralston confirms that, after he submitted his application, Mount “asked me to contact him [Mills] the following week.” He did so, and was interviewed and hired. Mount has been instructed to advise all applicants that they must be interviewed prior to being hired. If they request an interview when they submit their application and Mills is available, he may interview the applicant at that time. If Mills is unavailable and the applicant is “interested in an interview, all they have to do is make arrangements with Shelley [Mount] to set up an interview at a later date.”

Mills credibly denied that he called applicants for interviews, noting that some applicants do not follow up on their applications because they "are just filling out applications because ... of their responsibility to keep their unemployment," and that, if an applicant is "actually interested in going to work and they're sincere about it, they'll call back looking for work."

Charles Taylor testified that he was aware of the S.B.S. hiring procedure and that when "Paul [Mills] wasn't there," and presumably Mount was not available, he would give the applicant Mills' business card, tell the applicant to fill out the application and "call back . . . [to] schedule an interview." When acting in this manner, Taylor, like receptionist Mount, would be acting as an agent for S.B.S.

In July, S.B.S. advertised in the Cleveland Plain Dealer and Akron Beacon Journal for employees. The advertisements ran on Saturday and Sunday for 2 weeks, July 13 and 14, and July 20 and 21. Following the first publication of the advertisements, 12 individuals applied for work on July 15 and 4 individuals applied for work on July 16. S.B.S. hired five employees on July 16 and two others later in the week. On the Monday and Tuesday following the second publication of the advertisement on July 20 and 21, eight employees applied for work. S.B.S. hired one employee on Sunday, July 21, and six additional employees between July 22 and 24. Thus, a total of 14 employees were hired in mid-July following the publication of the advertisements, including 6 laborers and 2 ironworkers. President Mills testified that the hires he made filled the positions that were available, that there were no positions available for laborers or ironworkers on July 25. Thereafter, the next hire by S.B.S. occurred on September 30.

On July 25, a group of approximately 20 individuals entered the Taylor and S.B.S. office. The group included Business Manager Gary Dwyer of Iron Workers Local 15 and Regional Organizer Matt MacLellan of the Laborers, who served as spokespersons for the group. One of the members of the group was carrying a video camera with an audio receiver. S.B.S. President Mills was not present. The entrance into the office by these 20 individuals created a disruption that caused Charles Taylor to come from his office to see what was occurring.

A transcription of the audio that was recorded, the accuracy of which was stipulated by the parties, establishes that, upon observing the individuals, Taylor informed them that "we can't take all of you right now." He suggested that they make an appointment and stated that if they were "going to video it we're going to ask you to leave right now." Business Manager Dwyer noted that there had been an advertisement in the newspaper and Laborers Organizer MacLellan asked Taylor if he was "refusing to give us applications." Taylor responded that the applicants needed to "go back out" and then "come in one at a time and fill an application out and somebody will call you for an interview." Dwyer stated, "We're just looking for work." Taylor said, "That's great. Would you please leave here." Dwyer responded, "Leave here, how can we leave here?" Taylor pointed out that the people were blocking the entrance. They did not leave and enter one at a time as Taylor had requested. Dwyer stated, "We'll get in a nice straight line." Receptionist Mount stated that she would provide applications to everyone and "you can send them back in." Taylor informed the appli-

cants that they could fill out the applications and "drop them off, take them back, we're not going to cluster my office." MacLellan asked if this was "how you typically take applications." Taylor responded, "[W]e don't take 20 people at one time." Dwyer asked how the applicants could be sure that their applications would not be thrown away and receptionist Mount stated, "We, we won't." Taylor then stated, "You can call back up here and you can ask for an interview." Dwyer asked if the applications would be looked at. Taylor answered, "We'll take a look at them and depending on, we've hired quite a few people lately, okay. So if there's space and you're qualified . . ." Dwyer interrupted at that point stating that he had "quite a few people looking for work." Taylor continued, stating that if "you guys" fill out an application, "we'll be glad to take a look at it." The individual members of the group filled out their applications outside of the office on picnic tables or in their vehicles.

Mills was advised of the union applicants' coming to the office. He "personally didn't think they were looking for employment." He felt they "were there to be disruptive." Despite this, he testified that he reviewed the applications. He acknowledged that he did not call any of the applicants for interviews because "they're all told to set up an appointment on their own." Under normal circumstances, applicants are instructed by Mount that they must request an interview in order to be hired. On July 25, after the union-affiliated applicants had refused to go out and "come in one at a time," they had all been provided applications and informed by Taylor that they could "call back up here and . . . ask for an interview." No applicant did so.

Mills was asked specifically about each of the individuals who are alleged in the complaint as discriminatees. As already noted, Mills testified that he did not believe that any of the union-affiliated applicants named in the complaint "were there to acquire jobs," that he felt they "were there to be disruptive." He further testified that there were no positions available on July 25 and that none of the alleged discriminatees called for an interview.

On September 30, S.B.S. hired laborers Ted and Sonny Elenniss, who had applied on September 23 listing S.B.S. Supervisor Tim Farland as a reference. Mills testified that those individuals had previously worked with Farland and Richie Widmire, a longtime employee.

The first ironworker hired after July 25 was Mark Dorraugh. Mills testified that he does not go through previously filed applications in order to fill positions that come open. He explained that, "word travels in the field like hotcakes," that people hear of openings "by word of mouth," and that the applicant will "come back in and look for employment." The foregoing scenario occurred on November 5 when Dorraugh, who had applied on July 15 but not been hired, came back in. Mills speculated that Dorraugh may have heard of an opening from a current employee, Mike Keith, whom Dorraugh had listed as a reference. The next ironworker hired was Robert Stipe, who had initially applied for work on June 17. Stipe, who listed S.B.S. crane operator Bill Lynn as a reference, recontacted S.B.S. and was hired on January 6, 2003.

The only alleged discriminatee who testified was Regional Organizer Matt MacLellan, who applied for work as laborer. MacLellan admitted that he placed an incorrect telephone num-

ber on his application. When asked why he had done so, MacLellan responded that he did not want “any calls from people trying to prank me.” He pointed out that he had given his business card to Mount who had given it to Charles Taylor. MacLellan listed Taylor, whom he had met only minutes before filling out his application, as a reference. When asked why he had placed Taylor’s name as a reference, MacLellan answered, “Because I thought it would be funny.” MacLellan further falsified his application by showing attendance at Case Western Reserve. He admitted that he made that entry to “basically waste their time.”

MacLellan acknowledged that he was instrumental in forming The Coalition for a Safe Workplace, a nonprofit organization. In his involvement with the Coalition, MacLellan “help[s] stage demonstrations” including more than 20 demonstrations against Taylor and S.B.S. Shortly before a meeting of a local school board scheduled for September 30, the Coalition distributed fliers urging attendance at the school board meeting to prevent tax dollars from “support[ing] this contractor” and to “help keep this dangerous contractor out of our community.” MacLellan acknowledged that he had concluded that C. T. Taylor was “an unsafe company” prior to applying on July 25. The Coalition is not a labor organization.

MacLellan’s involvement with the Coalition suggests that he was not genuinely seeking to work for C. T. Taylor, a company that he believed had unsafe work practices. The Respondents’ brief notes the reference in Member Hurtgen’s concurring opinion in *FES*, 331 NLRB 9, 30 (2000) regarding applicants who are “not genuinely seeking employment” and argues that McClellan’s activities and false application confirm Mills’ conclusion that MacLellan was not seriously interested in employment. I am mindful that the Board majority does not address whether union affiliated applicants are “bona fide applicants.” *Eckert Fire Protection*, 332 NLRB 198 at fn. 4 (2000); but see *Exterior Systems, Inc.*, 338 NLRB No. 82 (2002), and *Windemuller Electric*, 306 NLRB 664, 674 (1992), in which the administrative law judge found that an applicant was “not seriously interested in employment” when he failed to place his telephone number on his application. Notwithstanding that MacLellan provided false information, listed as a reference someone he did not know, and wanted to “waste their time,” I shall consider this case in accord with Board precedent and Mills’ testimony that no positions were open on July 25 and that MacLellan did not contact S.B.S. after filing his application.

## 2. Analysis and concluding findings

The complaint alleges that the Respondents failed to consider for hire Matthew MacLellan, Will DeVito, Bruce Hensley, and Jeffery Carlson and refused to hire MacLellan on September 23, Carlson on November 5, and DeVito on January 6, 2003. Consistent with my recommended dismissal of the joint employer allegation, I shall address these allegations in terms of Respondent S.B.S.

Regarding the refusal to consider, the Board, in *FES*, 331 NLRB 9, 15 (2000), held:

To establish a discriminatory refusal to consider, pursuant to *Wright Line*, supra, the General Counsel bears the burden of showing the following at the hearing on the merits: (1) that

the respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment. Once this is established, the burden will shift to the respondent to show that it would not have considered the applicants even in the absence of their union activity or affiliation.

The record does not establish that the union applicants were excluded from the Respondent S.B.S.’s hiring process. All were provided applications. Consistent with receptionist Shelly Mount’s assurance, the applications were not thrown away; indeed, several were received as exhibits. It is undisputed that S.B.S. had a two-step hiring process. An applicant first filled out an application. The second step was an interview with President Mills.

The General Counsel argues that S.B.S. excluded the union applicants from its hiring process because it did not call any of them for interviews. I have credited Mills that he did not call applicants for interviews, that applicants who wanted to be hired will “call back looking for work.” The General Counsel argues that the applicants were given “conflicting advice” regarding interviews and that “no one with authority told the applicants what the next step in the employment process was.” I disagree. When the group of 20 applicants presented themselves, Taylor sought to bring order to the chaotic situation with which receptionist Mount was attempting to deal. Taylor, in speaking to the applicants regarding the application process just as he did when neither Mills nor Mount was available, was acting as an agent of S.B.S. See *GM Electric*s, 323 NLRB 125 (1997).

Taylor, acting with authority as an agent of S.B.S., informed the union applicants of the manner in which he desired that they conduct themselves while in the company offices. He requested that the applicants “come in one at a time and fill an application out and somebody will call you for an interview.” When the applicants did not comply with that request, Taylor requested that the applicants leave. They did not do so. When Taylor pointed out that the applicants were blocking the entrance, Business Manager Dwyer, without responding to, acknowledging, or complying with Taylor’s request that the applicants “come in one at a time,” stated, “We’ll get in a nice straight line.” Receptionist Mount stated that she would provide applications to all, even though that was not how applications were typically taken. Mount assured Dwyer that the applications would not be thrown away. At that point Taylor stated, “You can call back up here and you can ask for an interview.”

Contrary to the assertion in the General Counsel’s brief, there was no “secret interview requirement.” The applicants were informed twice that prospective employees would be interviewed. Taylor sought to accommodate the applicants by having them submit individual applications, to go out and “come in one at a time and fill an application out and somebody will call you for an interview.” When this request was not honored, Taylor asked the applicants to leave. They did not. Having ignored Taylor’s request to “come in one at a time,” the applicants were given applications which they thereafter filled out simultaneously. Mount assured Dwyer that the applications would not be thrown away. Taylor informed the applicants that

they could “call back up here and . . . ask for an interview.” If there was any confusion or uncertainty regarding what the applicants were told, the Unions could have simply played their own videotape upon which the foregoing audio was recorded. If any doubt remained regarding the procedure followed by S.B.S., MacLellan could have spoken with “salt” James Ralston who, pursuant to Mount’s instruction, had requested an interview and been hired.

The union applicants, through their spokespersons Dwyer and MacLellan, were intent upon obtaining applications on their own terms. They ignored Taylor’s effort to accommodate them by having them submit individual applications and be called for an interview. They then ignored his request to leave after failing to comply with his request that they “come in one at a time.” As the applicants were obtaining applications on their terms, as a group, Taylor informed them that they could “call back up here and . . . ask for an interview.” Even assuming animus, there can be no violation “with respect to union members who failed to comply with the Respondent’s hiring procedures.” *Watkins Engineers & Constructors*, 333 NLRB 818 at fn. 6 (2001). No applicant called back to ask for an interview. No applicant was excluded from the hiring process. I shall recommend that the refusal to consider-for-hire allegation be dismissed.

Although I have recommended dismissal of the refusal-to-consider allegation, in the event Board should disagree with that finding, I shall address the refusal-to-hire allegations. The Board, in *FES*, supra, held

To establish a discriminatory refusal to hire, the General Counsel must, under the allocation of burdens set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), first show the following at the hearing on the merits: (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants. Once this is established, the burden will shift to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation. Id. at 11. [Footnotes omitted.]

The record establishes two openings for laborers and two openings for ironworkers following the July 25 applications of the union employees. I find that the three alleged discriminatees, laborer Matt MacLellan and ironworkers Jeffery Carlson and Will DeVito were fully qualified for those positions. The termination of employee Ralston establishes animus. Thus, if it were to be found that those individuals complied with the Respondent S.B.S.’s application process, the General Counsel established a prima facie case.

Notwithstanding the existence of animus, there is no probative evidence that union animus contributed to the decision not to hire the applicants. For purposes of this analysis, I shall as-

sume that an interview was not an integral part of the S.B.S. application process. Having made that assumption, the record establishes that Mills relies upon people hearing of openings “by word of mouth.” Applicants who were not hired when they initially applied and are looking for work will “come in again.” In *Irwin Industries*, 325 NLRB 796 (1998), the applicants’ hiring resulted from “continued and persistent efforts to obtain work after the submission of an application.” Id. at 798. In this case, as in *Irwin Industries*, “none of the . . . applicants . . . actively sought employment with the Respondent after submitting their initial applications.” Ibid.

As noted above, two ironworkers were hired after July 25, on November 5 and January 6, 2003, respectively. Mills credibly testified that he does not review previously filed applications in order to fill positions that come open or call qualified applicants. He recognizes that craft employees hear of openings by word of mouth and come in seeking employment. Applicants Mark Dorraugh and Robert Stipe did exactly that. Furthermore, both of those individuals applied for employment earlier than Carlson and DeVito. The General Counsel argues that “these individuals ‘magically’ knew precisely when to check back about job openings,” implying that, even though Mills does not call applicants, the Respondent S.B.S. got word to them of the openings for which they were hired. Dorraugh’s application gives Mike Keith, a current S.B.S. employee, as a reference. Stipe lists S.B.S. crane operator Bill Lynn as a reference. Consistent with Mill’s testimony that “word travels in the field like hotcakes,” I find nothing magical or suspicious in inferring that Dorraugh and Stipe would have heard of upcoming openings simply by keeping in touch with their references. Neither Carlson nor DeVito came back in.

Similarly, MacLellan made no effort to contact S.B.S. after filing his application on July 25. Even if Mills had sought to contact MacLellan by telephone, he would not have succeeded because MacLellan had purposely placed an inaccurate number on his application. MacLellan was treated no differently from any other laborer who failed “to come back in.” On July 24, S.B.S. hired laborers Ken Thompson who had applied on July 22 and Matt Dishong who had applied on July 23. S.B.S. did not hire Angelo Marelis and Daniel Basset, both of whom applied on July 24, the day that Thompson and Dishong were hired. Thereafter the S.B.S. application log reflects that three individuals applied as laborers on September 1, 12, and 13, respectively. None were hired. Robert Carroll, who was from Florida, and Ted and Sonny Elenniss applied on September 23. Ted and Sonny Elenniss were hired. There were no openings on July 25, and neither MacLellan nor Marelis and Bassett, who had applied on July 24, were hired. So far as the record shows, none of them made any further attempt to obtain employment with S.B.S. There were no openings in mid-September and the three applicants who sought work on September 1, 12, and 13 were not hired. Mills called no one. In late September there were openings, and Mills hired two of the three applicants who sought work on September 23.

Even if it be assumed that the General Counsel established a prima facie case of refusal to hire MacLellan, Carlson, and DeVito, S.B.S. has rebutted that case. The union-affiliated applicants did not seek employment after submitting their initial

applications. S.B.S. assumes that applicants desiring to be hired will "come back in and look for employment." Two ironworkers who had applied before Carlson and DeVito did so and were hired. Carlson and DeVito did not come back in. Neither did MacLellan. Even if the Board should disagree with my conclusion regarding the refusal to consider-for-hire allegation, the record does not establish an unlawful refusal to hire, and I recommend that those allegations be dismissed.

#### CONCLUSIONS OF LAW

By discharging James Ralston because of his union affiliation and activities, the Respondent S.B.S. has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondent S.B.S. has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent S.B.S. having discriminatorily discharged James Ralston, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from June 25, 2002, to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>2</sup>

#### ORDER

The Respondent, Structural Building Systems, Inc., Hudson, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee because of that employee's membership in or activities on behalf of the Laborers International Union of North America or any other labor organization.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days from the date of this Order, offer James Ralston full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make whole James Ralston for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

<sup>2</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter, notify James Ralston in writing that this has been done and that the layoff will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to determine the amount of back-pay due under the terms of this Order.

(e) Mail to all former employees employed by the Respondent S.B.S. at any time on or after June 25, 2002, and post at its office and jobsites in and around Hudson, Ohio, copies of the attached notice marked "Appendix."<sup>3</sup> Such notice shall be mailed to the last known address of each former employee. Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent S.B.S.'s authorized representative, shall be mailed within 14 days after service by the Region and shall be posted by the Respondent S.B.S. immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent S.B.S. to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent S.B.S. has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. April 1, 2004

#### APPENDIX

##### NOTICE TO EMPLOYEES

##### POSTED BY ORDER OF THE

##### NATIONAL LABOR RELATIONS BOARD

##### An Agency of the United States Government

The National Labor Relations Board had found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

<sup>3</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT discharge or otherwise discriminate against any of you because of your membership in or activities on behalf of the Laborers International Union of North America or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer James Ralston full reinstatement to his former job or, if

that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

STRUCTURAL BUILDING SYSTEMS, INC.